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Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DESTEFANO, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race[.]"

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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INTRODUCTION

The results of promotional examinations for supervisors in the City of New Haven's Fire Department reflected a severe disparate impact. In response to this red flag that the tests may have been flawed, the City's Civil Service Board conducted five public hearings, over a period of two months, to consider whether to certify the results. The evidence before the Board raised further concerns that the tests had not in fact identified the most qualified candidates and suggested less-discriminatory alternatives. In the end, citing concerns about flaws in the tests, two of the four Board members voted against certification, leaving the test results uncertified and the supervisor positions open.

This response by the City—when faced with examination results that had a severe disparate impact and evidence substantiating the inference of discrimination—was both narrow and prudent. The City did not adjust test scores to benefit minority candidates, adopt affirmative-action policies, or engage in racially proportional promotions. Rather, upon having its concerns reinforced by a deliberative, open process, it simply declined to use the results.

Under petitioners' view, Title VII and the Constitution *required* the City to certify the test results. Yet the rule petitioners seek to impose—that employers make promotions first and sort out the problems with a test later—is not what Title VII or the Constitution demands. Neither Title VII nor the Constitution compels an employer to proceed with promotions based on employment tests in the face of well-grounded questions about the validity or legality of the tests. On the contrary, Title VII and the Constitution permit, indeed favor, the City's limited and reasoned race-neutral action.

STATEMENT OF FACTS

1. In 2003, the City of New Haven sought to fill lieutenant and captain vacancies in the Fire Department. According to a local union contract, promotions were to be made based on exams with written and oral components weighted 60% and 40% respectively. Pet. App. 606a. To qualify even to take the tests, candidates for lieutenant had to have 30 months of experience in the New Haven Fire Department, a high school diploma, and training courses in related subjects. Pet. App. 352a. Candidates for captain needed one year as a "certified fire lieutenant" in the Department, a high

school diploma, and formal training courses in related subjects. Pet. App. 365a.

The City retained a consultant, Industrial/ Organizational Solutions, Inc. ("IOS"), to develop and administer these exams. CAJA382. IOS interviewed incumbent lieutenants and captains, sent out job questionnaires (Pet. App. 614a-618a), asked the chief and assistant chief of the Department to identify relevant source material (Pet. App. 625a), and created a multiple-choice written test for each position, drawing on 1200 pages of source material (JA49; *see* Pet. App. 353a-359a, 367a-371a).

IOS did not, however, pursue a process known as an "Angoff workshop" (Pet. App. 698a), which enables a test-developer to "establish a content-valid, legally defensible cut-off score for the examination[]" (Pet. App. 321a; *see* Pet. App. 311a, 698a). Although IOS's proposal to the City had stated that it would use three fire experts from Chicago (Pet. App. 321a) to perform this "very critical process," IOS ultimately skipped it and used the City Charter's cut-off of 70 (Pet. App. 77a, 698a). IOS conceded that using the "conventional cut-off" of 70 "isn't very meaningful when you are trying to find … the cut-off score that defines minimally competent or minimally qualified, which is ultimately what you are looking to do in a situation like this." Pet. App. 697a.

Lacking a relevant cut-off score, IOS designed difficult tests. Pet. App. 698a-699a. Recognizing that "more difficult tests tend to have greater levels of adverse impact," it stated, "we are not going to create an exam to try and cater to the fact that the test won't have adverse impact." Pet. App. 698a; *see* Pet. App. 685a-686a.

"Standard practice" would have required review of the written tests by New Haven fire experts to ensure, among other things, that the content reflected an accurate understanding of New Haven rules and practices. Pet. App. 635a. The City had decided, however, in order to safeguard the integrity of the testing process (there had been allegations of cheating on past exams (Pet. App. 601a)), that no one from New Haven would review the tests prior to administration. Pet. App. 508a-509a, 635a-636a. IOS did not provide for review by other experts, save for a single battalion chief from the Atlanta area. Pet. App. 509a.

Candidates took the written and oral tests in November and December 2003 (CAJA700-701), and in late December, IOS provided the scores to the City (JA221).

2. Shortly thereafter, on January 9, 2004, a Connecticut state court issued a decision restricting the City's use of civil service exam results. CAJA1706-1720. Previously, New Haven had interpreted the so-called "Rule of Three" in the City Charter, which requires that a promotion be awarded to an individual receiving one of the top three scores on the relevant exam (Pet. App. 77a), as follows: Scores were rounded to the nearest integer (on the understanding that minute score differences were not statistically meaningful (*see* CAJA1701)), with each rounded score level constituting a "rank"; and the City could promote from the top three ranks for each position.[1] Although state

[1] In other words, if three candidates scored 90.9, 90.8, and 90.7, the City would round their scores to 91 and band them in a single rank (of 91) for purposes of the Rule of Three. *See Kelly* v. *City of New Haven*, 881 A.2d 978, 993-994 (Conn. 2005) (explaining

courts had previously disagreed with the City's interpretation as a matter of local law,[2] none of these courts had found that the City's interpretation or its application was in any way related to race,[3] and the City had continued to press its legal argument until the January 9, 2004 injunction (CAJA1707). The state court injunction, which prohibited this rounding procedure, constrained the City's authority with respect to these tests. Pet. App. 443a-444a.

3. When City officials reviewed the results of the tests, they found significant and unexpected racial disparities. CAJA700-702. The pass rate of black candidates on both the lieutenant exam and the captain exam was approximately one-half the corresponding rate for white candidates.[4] More jarringly, under the new Rule of Three, out of the nineteen possible candidates for

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the City's previous method). Under a Fire Department practice not required by the Rule of Three, the Department ordered candidates within a rank by seniority. *Id.* at 995; *see also Broadnax* v. *City of New Haven*, 851 A.2d 1113, 1120 n.9 (Conn. 2004) (City's authority broader than Fire Department practice).

[2] The City's interpretation was based on a 1993 Charter revision that changed the Rule of Three to address the top three "scores" rather than the top three "applicants." CAJA1685-1688.

[3] *See Bombalicki* v. *Pastore*, No. 378772, 2001 WL 267617 (Conn. Super. Feb. 28, 2001) (unpublished); *Henry* v. *Civil Serv. Comm'n*, No. 411287, 2001 WL 862658 (Conn. Super. July 3, 2001) (unpublished); *see also Hurley* v. *City of New Haven*, No. 054009317, 2006 WL 1609974 (Conn. Super. May 23, 2006) (unpublished); *Kelly*, 881 A.2d 978. Petitioners' statement to the contrary (Br. 29) is false. *See also infra* p. 39 & n.34.

[4] In both cases, the pass rate for black candidates was 52% of the corresponding rate for white candidates. *See* JA225-226.

promotion (for fifteen positions), none would be African-American. JA223-224.

These results were starker than under previous tests. Although prior tests had also reflected disparities, African-Americans had placed higher and had been available for promotions. JA218-219; CAJA734. The highest-ranked African-American candidate for lieutenant ranked third in 1996 and fifth in 1999, but thirteenth on the 2003 test. JA218. For captain, the highest-ranked African-American candidate had been fifth in 1998, but was fifteenth under the 2003 test. JA219.

The City invited IOS to discuss the tests and the results. IOS strenuously defended them. Pet. App. 670a. City officials, by contrast, believed that the severe disparate impact triggered a duty to inquire further and referred the issue to the Civil Service Board. JA221-222.

4. The Civil Service Board is an independent five-member organ of the City that administers the City's civil service employment system, including by supervising the process of competitive examinations and reviewing their results before certifying lists of eligible candidates. Pet. App. 74a-77a.

The Board held five hearings over a period of two months to consider whether to certify the test results.[5] All of the meetings were public, and the Board made clear that *ex parte* contacts were prohibited. CAJA768, 798. The Board stressed that it, and not City officials, would make the ultimate decision. CAJA819-820. Be-

[5] For excerpts of the hearings see JA22-169 and Pet. App. 465a-589a; for the complete transcripts see CAJA698-1162.

cause of a potential conflict (and at the request of petitioners' counsel), one of the five Board members (the only African-American on the Board) did not participate, leaving the Board with only four members to resolve the certification question. CAJA812-814, 875. The Board heard testimony from multiple sources on all sides of the issue.

a. A City official presented the Board with the test results, as well as data showing that the IOS examinations had produced a "stark[er]" disparity than had previous exams for these positions. JA24, 155.

The City's then-Corporation Counsel, Thomas Ude, informed the Board about the disparate-impact standard in employment discrimination law. JA134-144. He explained that a "significant adverse impact … triggers a much closer review, a much closer examination, because it's like setting off a warning bell that there may be something wrong." JA152; *see also* CAJA1012.

b. A number of firefighters testified that the exams tested material that was irrelevant in New Haven or contrary to New Haven firefighting policies. JA44-48; JA67-70. The source material also contained contradictory information on the same subject matter (CAJA786)—a problem that had been acknowledged previously by IOS (JA19-21). Other firefighters (including three petitioners), however, defended the tests, contending that they should be certified. CAJA772-773, 784-789, 1139-1142, 1145-1148.

c. Numerous members of the community testified. The head of the local union suggested that the Board hear from an independent expert. CAJA807-809. A representative from an organization of black firefighters noted that the nearby city of Bridgeport, which had experienced similar issues in the past, currently

used different relative weightings of oral and written exam components as compared to New Haven, and faced less disparate impact than it had before. JA64-66. Boise Kimber, an African-American minister and a member of the board of fire commissioners, testified that African-Americans were underrepresented in the Fire Department. CAJA769-771. Kimber stated that, because there were no African-Americans among the four sitting Board members, the Board lacked legitimacy to decide the question—an assertion to which Board members took strong offense. CAJA875-882.

Although a representative of white firefighters (petitioners' counsel in this case) and a representative of black firefighters both stated they would sue the City depending on the decision (CAJA816-817, 838), the Board stressed that it would not be motivated by a fear of litigation (CAJA738).

d. The developer of the tests, IOS's Chad Legel, testified in defense of the tests.[6] He explained that because of the City's decision to forgo internal review, no one in the City had reviewed the tests before they were given (CAJA936)—a fact that surprised Board members (CAJA982). When members of the Board asked Legel to suggest how they could independently verify the exams, he answered that any layperson could look at the tests and tell whether they were biased. CAJA996-997. The Board Chairman was skeptical that "a couple of people off the street" would be able to assess the tests. CAJA1001-1002.

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[6] IOS also had sent a letter to City officials defending its exams; in its live testimony, IOS presented the same arguments to the Board that appear in its letter. *Compare* Pet. App. 337a-339a *with* Pet. App. 501a-536a.

e. In search of more information, the Board sought to hear from independent experts. The local union suggested Dr. Christopher Hornick, an industrial psychologist in the same field as IOS. JA159. Hornick testified that he was "a little surprised at how much adverse impact there is in these tests," since he saw "significantly and dramatically less adverse impact in most of the test procedures that we design." JA93-94. Hornick also raised questions about whether a multiple-choice knowledge-based examination is an appropriate way to select fire officers: Such tests, he explained, measure the ability "to just memorize and give the correct answer from a multiple choice" (JA103), and there are other testing methods that are "much more valid in terms of identifying the best potential supervisors" (JA96). Hornick identified "situation judgment tests" or, alternatively, "assessment center[s]" as methods that "would have increased the likelihood of getting the best candidates at the top of the list[.]" JA102.

A second expert, Vincent Lewis, an experienced firefighter, stated that the tests were comparable to examinations he had taken in the past. JA114. A third expert, Dr. Janet Helms, spoke about general problems of race and culture in testing. JA120-133.

f. The Board held a fifth and final meeting. Ude provided further legal analysis. He stated that the relevant inquiry is "whether an examination is … really testing for what you're looking to test for[.]" JA137. He had reviewed a New Jersey case in which a fire department promotional examination was held invalid because it had tested candidates' "ability to recall what was in a particular text [more] than their firefighting or supervisory abilities." JA137-138. Ude noted that some questions on the New Haven exam were quite

similar to those discussed in the opinion in the New Jersey case. JA138, 148.[7] Ude expressed concern that the New Haven examinations had not "served th[e] purpose … [of] find[ing] good supervisors[.]" JA142. The City's Director of Personnel said, similarly, that "upon closer review of these two exams, their content has raised, rather than answered, questions about how valid these tests are for the purposes intended." JA156.

g. At the end of this fifth meeting, the Board members held a public vote. JA160-169. Two Board members voted to certify the exams, and two, Malcolm Webber and Zelma Tirado, voted not to certify. JA165-169. Tirado explained that she believed that "the process was flawed" and that "the test was flawed." JA167. Webber also voted no, explaining: "I originally was going to vote to certify. That was my original feeling before we got into the testimony. But I've heard enough testimony here to give me great doubts about the test itself and … some of the procedures. And I believe we can do better." JA166.

Because of the split vote, the results could not be certified. *See* JA169. There is no evidence whatsoever that the Board in general (or Webber or Tirado in particular) was improperly influenced by any advocates on either side of the debate.

5. Had the Board certified the exam results, under the City's Charter, the list of eligible candidates would have been sent to the board of fire commission-

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[7] The case referenced was *Vulcan Pioneers, Inc.* v. *New Jersey Department of Civil Service*, 625 F. Supp. 527 (D.N.J. 1985), *aff'd*, 832 F.2d 811 (3d Cir. 1987).

ers. CAJA1363. That board, in turn, would have selected lieutenants and captains from the list with the limited discretion provided under the Rule of Three. Presence on the list would thus not have guaranteed any individual candidate a promotion. *See Bombalicki* v. *Pastore*, No. 378772, 2001 WL 267617, at *4 (Conn. Super. Feb. 28, 2001) (unpublished).

Under its contract with the City, IOS was also required to prepare a "technical report" (which petitioners also refer to as a "validation study") detailing the steps it took in designing the tests. Pet. App. 326a-327a, 596a. IOS did not provide this report to the City. Pet. App. 597a. It never offered to do so (CAJA462), and there is no evidence that the City attempted to prevent IOS from preparing a technical report. According to IOS, the technical report was not "a necessary document," since the technical report would only summarize "other documents that already existed[.]" Pet. App. 597a; *see* Pet. App. 338a (letter from IOS to City stating that "there is nothing further we can add concerning the development and administration of the tests"). Notably, such a report would not have proved whether the tests were in fact "valid," *i.e.*, whether the tests actually identified the most qualified candidates; rather, it would have described the test development process (Pet. App. 596a).

6. Several months later, and before the City could decide how to proceed, petitioners filed the present action, effectively freezing the promotional process (Pet. App. 1013a-1014a). Petitioners' suit alleged, *inter alia*, a Title VII claim against the City and equal protection claims against the City and seven individuals, including the two Board members who voted not to certify.

JA194-196.[8] Following discovery, both sides moved for summary judgment. JA3-4. The district court granted respondents' summary judgment motion on the Title VII and equal protection claims. JA12; Pet. App. 6a.[9] The Second Circuit affirmed and then voted to deny rehearing en banc. JA16.

SUMMARY OF ARGUMENT

This case raises the question of what an employer may do, consistent with Title VII and the Equal Protection Clause, when faced with an employment test that appears to violate Title VII's disparate-impact provisions. Petitioners claim that if an employer declines to use the test results to make promotions, the employer will thereby violate Title VII and the Equal Protection Clause; indeed, they argue that both Title VII and the Constitution require the certification of such results. As the district court properly concluded, neither claim survives summary judgment.

On Title VII, petitioners first assert that the statute mandates that the employer use the test results irrespective of whether doing so would entail a disparate-impact violation. Congress, however, has enacted

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[8] The seven named individuals are: Malcolm Webber and Zelma Tirado, the two members of the Civil Service Board who voted not to certify the results; Boise Kimber, a member of the board of fire commissioners who testified at the hearings; Thomas Ude, Jr., the Corporation Counsel at the time of the hearings; Mayor John DeStefano, Jr.; former Chief Administrative Officer Karen Dubois-Walton; and former Director of Personnel Tina Burgett.

[9] It therefore did not reach the question whether the individual respondents were entitled to qualified immunity.

an employment discrimination statute that prohibits disparate-impact discrimination as well as disparate treatment; petitioners' approach is irreconcilable with the statute and must fail. Part I.A.

Nor is there any merit to petitioners' fall-back position that by declining to make promotions based on a potentially flawed and discriminatory test, an employer violates Title VII unless the test actually violated Title VII. Rather, this Court's precedents recognize the competing obligations employers face and the related need for flexibility, and have repeatedly refused to require an actual violation before permitting an employer's voluntary action under Title VII. Part I.B.

Petitioners' second fall-back position is that the relevant standard for assessing when an employer may decline to base promotions on an employment test is whether there is a "strong basis" for concluding the use of the tests would violate Title VII. Petitioners, however, import this "strong basis" standard from the constitutional context; this Court has applied a different, lower standard for statutory claims such as this, and petitioners offer no reason to apply the higher standard here. Nonetheless, in light of the facts of this case, this dispute is largely of academic significance. In the present context—in which an employer seeks to avoid violating Title VII's disparate-impact provisions—the "strong basis" standard would require, at most, a prima facie case of a disparate-impact violation coupled with evidence substantiating the inference of discrimination, such as evidence suggesting that the tests were flawed or that there were equally valid, less-discriminatory alternatives. Part I.B.2.

Even assuming the Court applied the constitutional "strong basis" standard, it is easily met here. In par-

ticular, the Board heard evidence not only of a severe racial disparity, but also of serious questions as to whether the tests in fact properly identified the best candidates for the job, and of alternatives that further highlighted flaws in the tests and suggested less-discriminatory options that were at least as valid as the tests themselves. The Board's decision was thus grounded in a "strong basis." Nor are there any material disputed facts supporting petitioners' apparently distinct argument that the City was in fact motivated by an intent to discriminate. Part I.C.

Petitioners' final Title VII argument—that by declining to certify the test results the City violated 42 U.S.C. § 2000e-2(*l*), which makes it unlawful for employers to "alter the results of" employment tests—fails because declining to certify test results does not alter the scores. Part I.D.

As to petitioners' equal protection claim, their argument falters at the outset because strict scrutiny does not apply. This case does not involve racial classifications but rather race-neutral action—the non-certification applied to all candidates of all races. For strict scrutiny to apply in such circumstances, petitioners would need to establish the City's discriminatory intent. Petitioners' principal argument in this regard is that compliance with Title VII constitutes a discriminatory intent. This is contrary to the case law and would up-end several statutory schemes and government programs. Petitioners' alternate argument, that compliance was a pretext for an actual discriminatory purpose, lacks any support in the record that could create a material disputed fact necessary to survive summary judgment. Part II.A.

In any event, even if strict scrutiny applies, respondents' narrow, race-neutral action survives review. Compliance with Title VII's disparate-impact provisions constitutes a compelling interest given that the City readily satisfies the constitutional standard of "strong basis" to conclude the use of the tests would violate Title VII's disparate-impact provisions. Finally, the City's conduct, namely declining to certify tests that appeared to violate Title VII, is by definition narrowly tailored—the City did no more than avoid the violation. Part II.B.-C.

ARGUMENT

I. DECLINING TO CERTIFY THE TEST RESULTS DID NOT VIOLATE TITLE VII

Congress's comprehensive statutory scheme guides the answer to the question of what employers may do when faced with a test with a severe adverse impact where additional evidence substantiates the inference of discrimination raised by the disparity: Consistent with its statutory obligations, the employer should simply decline to make use of the apparently discriminatory test.

A. Title VII Does Not Require, But Rather Forbids, Promotions Based On Employment Tests That Violate The Disparate-Impact Provisions

Petitioners assert (Br. 43, 46, 49) that Title VII requires employers to make promotions based on employment tests even where doing so would violate the statute's disparate-impact provisions. By arguing that compliance with Title VII itself violates Title VII, petitioners reject rather than apply the law Congress enacted.

In Title VII, Congress acted to prohibit both "disparate treatment" on the basis of race, gender, religion, or national origin, as well as employment practices that have a "disparate impact" and are not otherwise justified. Both disparate treatment and unjustified disparate impact are forms of discrimination. Disparate impact recognizes that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Thus, where an employment practice has an adverse impact, it will violate Title VII unless (i) the practice is job-related and consistent with business necessity *and* (ii) there are no equally valid, less-discriminatory alternatives. 42 U.S.C. § 2000e-2(a), (k)(1)(A). In addition to offering a means to smoke out intentional discrimination,[10] this prohibition recognizes that an adverse impact serves as a red flag that a practice may be flawed, thereby not accurately selecting the most qualified candidates. Requiring use of less-discriminatory alternatives acknowledges that certain practices may appear neutral but nonetheless perpetuate discrimination. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971) (disparate impact seeks to root out employment practices that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

Petitioners' argument that compliance with disparate-impact provisions cannot justify forgoing promotions asks this Court to read disparate impact out of the

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[10] *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975); *cf. International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977).

statute. By resting on the platitude that avoidance of unintentional discrimination cannot warrant intentional discrimination (Br. 49; *see also* Br. 66-67), this argument assumes that compliance with Title VII's disparate-impact provisions is itself discrimination. This assumption flouts Congress's intent—by ignoring the fact that Congress expressly outlawed disparate impact in order to combat discrimination, *see* Civil Rights Act of 1991, Pub. L. No. 102-166 § 2(2)-(3), 105 Stat. 1071, 1071; 42 U.S.C. § 2000e-2(a), (k)(1)(A), and by failing to read the provisions of Title VII in harmony, *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007). With the disparate-impact and disparate-treatment prohibitions, "Congress did not intend to expose those who comply with [Title VII] to charges that they are violating the very statute they are seeking to implement." 29 C.F.R. § 1608.1(a).

Under petitioners' interpretation, an employer faced with a test or other employment practice with a disparate impact must nonetheless proceed with it even if it is not appropriate for the position or there are less-discriminatory alternatives. If the employer does not do so, it will be deemed to have intentionally discriminated against the group that fared better under the practice. This view transforms the adverse impact of the practice from a red flag that the practice may be unnecessary or discriminatory into a shield for those who fared well under the dubious practice, even if they did so precisely because of its defects.

Petitioners offer no relevant authority for this reading of Title VII, and the case law that addresses similar questions is contrary to their view. For example, in *Johnson* v. *Transportation Agency*, 480 U.S. 616, 626 (1987), this Court concluded that Title VII permits promotion decisions to be shaped by reliance on a gen-

der-conscious affirmative-action program that is consistent with congressional objectives under Title VII. Given that holding—and petitioners offer no reason to depart from it—it follows that promotion decisions can be shaped by the need to comply with Title VII itself.

B. A Strong Basis In Evidence Of A Disparate-Impact Violation Readily Suffices To Warrant Non-Certification Of Test Results

Given that Title VII does not require an employer to violate the disparate-impact provisions in order to comply with the statute, the next question is in what circumstances may an employer rely upon compliance with Title VII as a justification for declining to certify test results. The applicable standard must provide employers with sufficient flexibility to balance the competing interests at stake, namely the need to comply with the various provisions in Title VII so as to avoid discrimination and obtain the most-qualified workforce.

1. One approach petitioners espouse (Br. 43-44; *see also* Br. 33) is that an employer may act to comply with Title VII only where use of the tests for promotions would actually violate Title VII's disparate-impact provisions. But this Court has rejected the argument that there must be a Title VII violation in order to permit an employer to take remedial action under Title VII. *Johnson*, 480 U.S. at 630; *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 208-209 (1979); *id.* at 213-215 (Blackmun, J., concurring). Petitioners point to nothing that undermines these decisions, and their rationale remains applicable here.[11]

[11] Even where the Court has assessed when, consistent with the Equal Protection Clause, actions may be taken to remedy legal

Petitioners' approach, moreover, runs contrary to Congress's intent that voluntary compliance be "the preferred means of achieving the objectives of Title VII." *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 515 (1986); *see also* 29 C.F.R. § 1608.1(b) ("Congress strongly encouraged employers" to comply voluntarily); *see* U.S. Br. 12-13, 16-17.

Lacking support in the law, petitioners invoke the specter of quotas or racial balancing and assert the need to protect "bona fide merit systems." Br. 55; *see also* Br. 67. But requiring an actual disparate-impact violation does not advance these interests. As an initial matter, Congress has taken care to guard against such results, *see* 42 U.S.C. § 2000e-2(j), including by enacting a provision that prohibits race-norming of test scores, *id.* § 2000e-2(*l*). Thus, regardless of whether an employment test violates Title VII, there are protections against such conduct. In addition, for employers seeking to change an ongoing practice, petitioners' rule (of certain liability to one group or another) would have a chilling effect that may result in employers forgoing changes that will improve the hiring process.

Moreover, a standard that gives employers more flexibility entails less aggressive uses of race than what petitioners propose. Under petitioners' view, employers should certify test results even if they have substantial concerns that using the tests would violate Title VII. If, however, the tests are later judged to be discriminatory, an appropriate remedy will often neces-

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violations, it has not required proof of an actual violation. *See, e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

sitate a messy unscrambling of decisions, with an aggressive use of race.[12] It is far preferable to permit employers to decline to certify apparently discriminatory tests even without conclusive evidence to that effect.

2. For these reasons, something less than an actual violation is sufficient to permit an employer to decline to use tests for promotion decisions.[13] Petitioners suggest that, if the actual violation is not needed, the standard is whether there is a "strong basis" on which to conclude that use of the tests would violate Title VII. Br. 49-50; *see also* Br. 56.

To support this view, petitioners rely on *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion), and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989), two equal protection cases that used this standard in assessing when a government may resort to race-preferential policies as a remedy for past discrimination. Petitioners offer no explanation for why the threshold required to warrant an affirmative-action program involving set-asides in hiring or contracting ought to apply to the statutory question under Title VII of when an employer may decline to certify an employment test. Indeed, this Court's decisions in *Johnson* and *Weber* indicate that the constitutional "strong basis" standard does not apply in the Title VII context and that Title VII sets a

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[12] *See, e.g.*, *Local No. 93*, 478 U.S. at 510-515 (affirming approval of consent decree requiring promotion of minority firefighters after judicial findings of past discrimination by city).

[13] *Accord* Cato Inst. et al. Amicus Br. 13 ("The employer need not be certain that the test establishes an adverse impact claim.").

lower standard. *See Johnson*, 480 U.S. at 627 n.6, 633 n.11; *see also Weber*, 443 U.S. at 213-215 (Blackmun, J., concurring).[14] In any event, the question whether a lower standard ought to apply is of largely academic significance in this case because even the higher "strong basis" standard is satisfied here.

The Court has made clear that the "strong basis" standard must give employers some flexibility so as to balance the competing objectives employers face in trying to comply with the Equal Protection Clause as well as with various statutory provisions. In *Wygant*, for example, there was the need to balance compliance with the Equal Protection Clause and the obligation to "eliminate" discrimination. 476 U.S. at 277 (plurality opinion). Were the Court to import this standard here, the same need to balance considerations would apply—the City is seeking to comply with both its disparate-treatment obligations and its disparate-impact obligations and faces potential liability on both fronts. *Cf. id.* at 291 (O'Connor, J., concurring in part and concurring in the judgment) (recognizing potential for liability on both sides). The "strong basis" standard reflects that difficult position by offering a bounded range of permissible conduct.

Assuming, *arguendo*, that the constitutional "strong basis" standard is applicable here, the framework for disparate-impact liability shapes the contours

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[14] *Johnson* and *Weber*, moreover, involved employer-initiated affirmative-action policies that were not required by Congress and that expressly sanctioned preferential hiring of minority and female employees. Here, the employer is merely declining to use employment tests in an effort to comply with Congress's mandate in Title VII.

of that standard. Where there is a prima facie case of discrimination,[15] the employment practice will not survive review if it is *either* not job-related and consistent with business necessity *or* there exists an equally valid, less-discriminatory alternative that still serves the employer's legitimate business needs. 42 U.S.C. § 2000e-2(a), (k)(1)(A). This Court has suggested that a "strong basis" is met where the "threshold conditions" for liability are present. *Bush* v. *Vera*, 517 U.S. 952, 978 (1996) (plurality opinion). This suggests that, in this case, a prima facie case that the tests violate Title VII's disparate-impact provisions may suffice. *See Croson*, 488 U.S. at 500. Accordingly, a "strong basis" is surely met where there is a prima facie case and the inference of discrimination is substantiated (though not necessarily proven) by evidence that raises concerns about test flaws or that suggests the availability of equally valid, less-discriminatory alternatives. Even under the higher, constitutional "strong basis" standard, petitioners' claim does not survive summary judgment.

C. In Light Of The Undisputed Facts, Affirmance Of The Grant Of Summary Judgment In Favor Of The City Is Warranted

The principal question of fact in this case is whether the relevant standard, whether "strong basis" or otherwise, has been met. This question arises as part of the *McDonnell Douglas* analytical framework governing petitioners' claim, specifically, as part of the question whether the City's proffered reason for its ac-

[15] This may be established through statistical evidence that "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle*, 422 U.S. at 425.

tion—that it sought to comply with Title VII—is pretextual. The pretext question turns in part on whether the stated rationale is credible; assuming, *arguendo*, that the constitutional standard applies, the proffered reason for non-certification is credible if there is a "strong basis" to conclude that using the tests would have violated Title VII. In this case, in light of the ample evidence before the Board, this standard is easily met. Petitioners' alternate pretext argument is that the City was engaged in race politics and intended to harm whites in favor of African-Americans; this unsupported argument is insufficient for the claim to survive summary judgment.

1. The applicable framework

Petitioners' Title VII claim is that the City intentionally discriminated against them by declining to certify the test results. Such disparate-treatment claims are traditionally assessed under the *McDonnell Douglas* analytical framework. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

Under the *McDonnell Douglas* framework, a plaintiff alleging a disparate-treatment claim must first establish a prima facie case of discrimination. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981). That shifts the burden to the employer to articulate a legitimate nondiscriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802. This burden "is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (quoting *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 509 (1993)). The employer's nondiscriminatory reason rebuts the inference of discrimination and the employee must then prove "'discrimination *vel non*.'" *Id.* This

gives the plaintiff the "opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256.

In this case, the Court can easily dispense with the first two steps of the inquiry. The district court assumed the first step, that petitioners established a prima facie case of employment discrimination, and it is assumed, *arguendo*, by the City here. The City's proffered legitimate nondiscriminatory reason for noncertification is compliance with Title VII's disparate-impact provisions.[16] The City easily meets its burden of production: The record reflects, among other things, contemporaneous public statements and affidavits attesting to this rationale by the Board members who voted against certification (JA166-167; CAJA1605, 1611), as well as the basis for the rationale (*e.g.* JA44-48, 96-99). Critically, this evidence "need not persuade the court that [the City] was actually motivated by the proffered reasons," because the burden of proving the ultimate fact of discrimination "remains at all times with the plaintiff." *Burdine*, 450 U.S. at 254, 253; *Hicks*, 509 U.S. at 510-511.

The pretext component of the analysis in this case does not raise a genuine dispute of material fact, though petitioners argue otherwise (*e.g.*, Br. 54). A plaintiff may demonstrate pretext in two ways: (1) "by showing that the employer's proffered explanation is unworthy of credence" or (2) by showing "that a dis-

[16] Any argument that compliance with Title VII is not a legitimate nondiscriminatory reason fails; Congress has determined that compliance with the disparate-impact provisions combats discrimination—it does not itself constitute discrimination. *See supra* Part I.A.

criminatory reason more likely motivated the employer[.]" *Burdine*, 450 U.S. at 256. "'[I]t is not enough,'" however, "'to *dis*[]believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.'" *Reeves*, 530 U.S. at 147 (emphasis in original). The burden of demonstrating pretext thus "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256.

The first option, concerning the credibility of the City's proffered reason, rests on the standard discussed in Part I.B., *supra*. Under the constitutional standard, the proffered reason for non-certification—compliance with Title VII's disparate-impact provisions—will be credible if there is a "strong basis" that the tests violated Title VII. Even under this high standard, there are no material disputed facts relevant to this inquiry into the "strong basis." Accordingly, even assuming *arguendo* the Court were to apply this standard, affirmance is appropriate. *See infra* Part I.C.2.

The second option for demonstrating pretext, establishing that the City was more likely motivated by a discriminatory reason, similarly does not require remand. The evidence to which petitioners point is largely irrelevant and creates no genuine material factual disputes. *See infra* Part I.C.3.

Notably, petitioners now assert that the *McDonnell Douglas* framework ought not apply and the burden ought to rest on the City to "demonstrate that the[] use of race was lawful." Br. 48. Specifically, petitioners assert that the City's reason for non-certification should be treated as "direct evidence of the use of race," which would place the burden on the defendant. *Id.* No court has passed on this argument, and the ef-

fort to place the burden on respondents is both unsupported by the case law[17] and futile: Regardless of the allocation of the burden of proof, there are no genuine disputes of material fact concerning whether there was a strong basis in evidence.

2. There are no material disputed facts as to the credibility of the City's reason for declining to certify the test results

A remand for consideration of the credibility of the City's stated rationale of complying with Title VII's disparate-impact provisions is unnecessary here; the evidence reflects no material disputed facts as to whether there was a strong basis to conclude that the use of the tests would violate Title VII. As an initial matter, the test results establish a prima facie case of

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[17] In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985), an ADEA case, the Court held that a job transfer benefit "discriminatory on its face" (expressly dependent on age) was "direct evidence of discrimination" that rendered *McDonnell Douglas* inapplicable. Here, petitioners argue (Br. 48) that the City's "use of race" is such "direct evidence." If petitioners' argument is that efforts to comply with Title VII are "direct evidence" of discrimination, it fails. This approach would up-end Title VII law, leaving plaintiffs with a distinct advantage (a win unless the employer can meet its heavy burden) where the employer was merely seeking to comply with federal law. Unsurprisingly, this Court has rejected comparable efforts to ease plaintiffs' burdens in Title VII cases. In *Johnson*, the employer cited an affirmative-action program to explain the promotion decision, but despite the use of "the sex of a qualified applicant," the Court expressly observed that *McDonnell Douglas* applied, and that it remained the plaintiff's burden to show pretext. 480 U.S. at 621, 626-627. Like all plaintiffs bringing disparate-treatment claims, it is up to petitioners to prove their case; if they cannot do so, the courts should not assume entitlement to relief.

discrimination, reflecting severe racial disparities. The inference of discrimination created by the prima facie case is substantiated by the evidence concerning the tests and alternative testing means. The Board heard ample evidence of problems in the test design that created substantial doubt that the tests were properly assessing the candidates for promotion, including problems relating to the content of the tests as well as the testing method. Compounding these concerns was evidence suggesting that alternatives would both better assess the candidates and have a less adverse impact. Even were the Court to apply the constitutional "strong basis" standard, these factors combine to produce a sufficiently strong basis for concluding that the tests violated Title VII's disparate-impact provisions.

a. A prima facie case of disparate-impact discrimination

Petitioners appear to concede (Br. 50-51) that had a plaintiff challenged the tests, the test results would have constituted prima facie evidence of a disparate-impact violation, and properly so, given the "evidence of adverse impact" (Br. 50; *see also* CAJA Add. 17, 30). The pass rates of black candidates on the lieutenant and captain exams were approximately one-half the corresponding rates for white candidates. JA225-226. This severe disparity is much lower than the 68% rate that constituted a prima facie case of discrimination in *Connecticut* v. *Teal*, 457 U.S. 440, 443 (1982), and the 80% rate (the 4/5ths rule) rule of thumb in the EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D). And given the rankings and the Rule of Three, no African-Americans could be considered for any of the fifteen then-vacant lieutenant or captain positions. JA223-224; 29 C.F.R. § 1607.4(D); *cf.*

International Bhd. of Teamsters v. *United States*, 431 U.S. 324, 342 n.23 (prima facie case established where no African-Americans hired as line drivers—"the inexorable zero").

b. Evidence that the tests were not job-related or consistent with business necessity

Petitioners insist that the City's legitimate nondiscriminatory reason, compliance with Title VII, cannot be credible because the tests accurately measured the most qualified candidates and the City knew as much. *See* Br. 20, 35, 51-52, 54. Petitioners' unsupported assertions, however, neither undermine the ample evidence indicating that the exams were flawed nor call into question the Board's concerns in this regard.

After five days of hearings, one of the Board members voting against certification stated that, although he was originally going to vote to certify, he had "heard enough testimony here to give [him] great doubts about the test itself and the testing"; the other stated that she "fe[lt] that the process was flawed" and "the test was flawed." JA166-167.[18] These concerns were well grounded in the testimony before the Board.

The testimony raised substantial questions regarding whether the examinations accurately tested relevant knowledge. Evidence before the Board revealed that no one in New Haven had reviewed the tests (Pet.

[18] Petitioners claim (Br. 15) that two City officials had no concerns about test flaws, but the evidence is unequivocal that the Board was interested in exam validity (*see, e.g.*, CAJA748) and that the two Board members who voted against certification were concerned about test flaws (JA166-167).

App. 508a-509a; CAJA982), and Hornick, an industrial psychologist, testified that by precluding internal review, the City had made it "inevitabl[e]" that the tests covered topics "that don't necessarily match up into the department." JA98.[19] Hornick's concerns were borne out by evidence before the Board of irrelevant or contradictory exam questions.[20]

Testimony also raised concerns that the examinations did not test the qualities necessary for a fire department captain or lieutenant but, rather, simply tested rote memorization skills. Indeed, then-Corporation Counsel Ude told the Board that questions on the tests were similar to those in firefighter promotional exams in New Jersey that a court had rejected as being "more probative of the test-taker's ability to recall what was in a particular text than their firefighting

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[19] The sole person to review the tests was a fire officer from outside Atlanta. Pet. App. 509a. Not only is the relevance of this review questionable, but standard practice requires review of an exam by multiple experts. *See* Livingston & Zieky, *Passing Scores: A Manual for Setting Standards of Performance on Educational and Occupational Tests* 16 (Educ. Testing Serv. 1982); *see generally* Brannick et al., *Job and Work Analysis* 276 (2d ed. 2007). Legel later testified that internal review was "[s]tandard practice." Pet. App. 635a; *see also* Ployhart et al., *Staffing Organizations: Contemporary Practice and Theory* 315 (3d ed. 2006) ("content validation of tests requires informed judgments from people who know about the job").

[20] For example, one question asked whether to approach a particular emergency from uptown or downtown, even though such distinctions are meaningless in New Haven. JA48. For another question, the correct response for New Haven practice was not offered as an answer. JA44-45.

or supervisory abilities." JA137-138; JA148.[21] Hornick likewise raised concerns about the relevance for firefighter promotions of multiple-choice exams, which test rote memorization. JA102-103.

The evidence that has come to light in this litigation offers nothing to undermine the grounds to conclude the tests were flawed—rather, the evidence only reinforces that there was ample cause for concern. To start with, IOS did not design the tests so that 70, the passing scores, actually reflected minimal competence for promotion. Legel explained that IOS skipped the "very critical process"—the Angoff workshop—that determines proper cut-off scores. Pet. App. 698a.[22] Instead, IOS designed "difficult" written tests, which

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[21] *See Vulcan Pioneers, Inc.* v. *New Jersey Dep't of Civil Serv.*, 625 F. Supp. 527, 539-540 (D.N.J. 1985), *aff'd*, 832 F.2d 811 (3d Cir. 1987); *see also, e.g.*, *Firefighters Inst. for Racial Equality* v. *City of St. Louis*, 616 F.2d 350, 359 (8th Cir. 1980).

[22] While petitioners assert (Br. 7) that the "cutoff … score was calibrated to equate with minimal competence," it is undisputed that IOS did not perform an Angoff workshop (Pet. App. 697a-698a). While IOS claimed that it did not perform this step because of New Haven's concerns for secrecy (Pet. App. 697a-698a), the reason is irrelevant to the question whether the tests were properly designed. *Cf. Isabel* v. *City of Memphis*, 404 F.3d 404, 413 (6th Cir. 2005) (affirming rejection of test where district court found "'the cutoff score was nothing more than an arbitrary decision and did not measure minimal qualifications'"). Having failed to conduct an Angoff workshop, there is no evidence that IOS took any other steps to calibrate the scores. *See* Pet. App. 338a (IOS letter stating "there is nothing further we can add concerning the development and administration of the tests"); Pet. App. 330a (explaining information a technical report typically contains, including cut-off score calibration process, but not claiming IOS calibrated the scores here).

necessarily screened out large numbers of candidates. Pet. App. 685a. This Court has disapproved of this very approach. *See McDonnell Douglas*, 411 U.S. at 806 (suggesting that "a testing device which overstates what is necessary for competent performance" would be improper); 29 C.F.R. § 1607.5(H).

Moreover, in his testimony, Legel never suggested that the tests were calibrated closely enough to be used to rank-order candidates, which requires that each higher score reflect better anticipated job performance.[23] The precision of the scores was critically important because of the intervening state court decision interpreting the Rule of Three so as to prevent the City from rounding to the nearest integer (CAJA1706-1720), which meant that New Haven would be promoting based on score differentials of a tenth, or even a hundredth, of a point.

Petitioners do not suggest that these concerns about flaws are unfounded except insofar as they insist that the City knew "or willfully endeavored to avoid knowing" that the tests were valid. Br. 51. This argument rests on their claim that the test designer "stood ready" to provide, and the City refused to receive, a "technical report" that would have proved the tests were job-related. Br. 51-52. This argument is a red herring.

The "technical report" or "validation study" would not, as petitioners' arguments (Br. 51-52) suggest, ac-

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[23] *See* 29 C.F.R. § 1607.15(C)(7) (employer should "specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance"); Am. Psychological Ass'n, *Standards for Educational and Psychological Testing* 29-31 (1999) (tests used for ranking require higher levels of precision).

tually prove whether the tests were "valid" in the sense of being job-related to properly assess the candidates for the promotions. Rather, as IOS itself has made clear, it is a descriptive document that lays out the steps taken in the process of designing a test. IOS explained this report is not in itself "a necessary document" because it simply summarizes the test development process. Pet. App. 596a-597a; *see also* Pet. App. 338a (IOS letter stating "there is nothing further we can add concerning the development and administration of the tests[]"). The report would not have proved whether the tests themselves were valid or flawed and, in turn and contrary to petitioners' suggestion (Br. 11, 51-52), would not have protected the City in any future litigation, as the case law makes clear. *See, e.g.*, *Firefighters Inst. for Racial Equality* v. *City of St. Louis*, 616 F.2d 350, 357 (8th Cir. 1980) (St. Louis "attempted to establish the validity of the examination" and submitted a validation study, but "the examination is not content valid").

c. Evidence of equally valid, less-discriminatory alternatives

The evidence before the Board of various less-discriminatory alternatives further supported the inference from the severe adverse impact. Petitioners cite nothing that suggests otherwise. The proposed alternatives included different ways to use the same type of tests as well as different testing regimes entirely.

First, the Board heard evidence of an alternative that would weight written and oral portions of the exam differently. *See* JA65-66, 150. The written component tested for technical knowledge, and the oral component tested for skills. Pet. App. 648a-650a. The relative weightings were arbitrary: They did not re-

flect any assessment of the relative importance of the two components for job performance, but simply came from a contract with the union. Pet. App. 606a-607a. Because the City's weightings were arbitrary, a different weighting would have been at least as valid. Testimony indicated that neighboring Bridgeport's tests use different weightings and are less discriminatory. JA65-66. Based on the raw test scores (Pet. App. 437a-438a), if the tests were weighted 70%/30% oral/written, then two African-Americans would have been considered for lieutenant positions and one for a captain position.

Second, promoting under the City's previous interpretation of the Rule of Three would have been a less-discriminatory alternative. Pet. App. 443a-444a. As explained, *supra* pp. 4-5, under the former interpretation (the City's interpretation at the time the tests were designed and administered), the Rule of Three would have permitted rounding scores to the nearest integer and promoting from the top "ranks," yielding additional candidates available for each promotion slot. Under this option, candidates eligible for the open slots for both positions would have included four African-Americans and one additional Hispanic candidate. *See* Pet. App. 437a-438a. That a state court permanently enjoined the City from employing this interpretation as a matter of municipal law (Pet. App. 443a-444a) does not eliminate this option as an alternative or otherwise immunize the City from Title VII liability, 42 U.S.C. § 2000e-7.[24]

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[24] *See Brown* v. *City of Chicago*, 8 F. Supp. 2d 1095, 1111-1112 (N.D. Ill. 1998) (method city explored was available alternative,

This alternative of construing the Rule of Three to permit rounding is a form of "banding" of scores; banding is rooted in the fact that every exam has some margin of error, *i.e.*, an amount by which a candidate's score might fluctuate independent of the candidate's true quality.[25] As Judge Posner has explained, banding is "a universal and normally an unquestioned method of simplifying scoring by eliminating meaningless gradations" between two candidates whose scores differ by less than the margin of error. *Chicago Firefighters Local 2* v. *City of Chicago*, 249 F.3d 649, 656 (7th Cir. 2001); *see also, e.g.*, *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (7th Cir. 2004) (banding properly "respect[s] the limits of [an] exam's accuracy while avoiding any resort to race or ethnicity"). Petitioners even stated that "alternatives such as banding of candidates within a defined score spread are reasonable." Pet. CA Reply 9.[26]

The Board also heard evidence of alternative testing approaches, including situation-judgment tests and assessment centers. JA102-103. Hornick informed the Board that situation-judgment exams evaluate candidates on "the ability to apply their knowledge as opposed to [the ability to] memorize[.]" *Id.* Situation-

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even though state law prohibited it), *aff'd sub nom. Bryant* v. *City of Chicago*, 200 F.3d 1092 (7th Cir. 2000).

[25] Am. Psychological Ass'n, *Standards for Educational and Psychological Testing* 25 (1999).

[26] Score banding does not violate the prohibition on adjusting scores in Section 2000e-2(*l*); treating scores within a certain range (for instance, a range that covers the margin of error) as functionally equivalent does not implicate this provision as the alteration affects all races equally. *Local 2*, 249 F.3d at 655-656.

judgment tests (a type of written test) are viewed as "good predictors of job performance" that regularly produce much less adverse impact than job-knowledge tests. McDaniel et al., *Use of Situational Judgment Tests to Predict Job Performance*, 86 J. Applied Psychol. 730, 736 (2001). Assessment centers evaluate actual behavior in typical job tasks, and when properly developed "show considerable predictive validity." Int'l Task Force on Assessment Ctr. Guidelines, *Guidelines and Ethical Considerations for Assessment Center Operations* 2, 8 (2000).

Petitioners do not counter any of this evidence and, in fact, evidence in this litigation only confirms that other less-discriminatory alternatives were available. For example, the City could have required minimum competency on both oral and written exams, especially since they were testing for different traits. Instead, the City's approach permitted a candidate to compensate for a failing score on one component with a high score on the other, a rule that favored two white candidates within the ten eligible for promotion to lieutenant who had failed the oral portions of the exam. Pet. App. 437a.[27] Based on the raw test scores, the alternative requirement of passing scores on each component would have allowed the City to consider one African-American for a lieutenant promotion. *See id.*

* * *

[27] *Cf. Gulino* v. *New York State Educ. Dep't*, 460 F.3d 361, 387 (2d Cir. 2006) (validity of one component could not justify a multi-component test when a candidate could compensate for failing one part with a high score on another).

In this case, the evidence yields no material disputed facts concerning the credibility of the Board's reason for declining to certify the test results, namely the need to comply with Title VII. The inferences of discrimination to be drawn from the extreme adverse impact were buttressed by evidence of flaws in the tests as well as less-discriminatory and equally, if not more, valid alternatives. Taken together, these considerations more than suffice to permit the City's approach, even if the Court applies the constitutional "strong basis" standard. That the tests had their supporters does not cast doubt on the credibility of the Board's conclusion or undermine the "strong basis" in light of the substantial evidence that supported the inference of discrimination.

3. Petitioners' assertion that the City was motivated by discriminatory intent cannot survive summary judgment

Unable to assail the credibility of the legitimate nondiscriminatory reason of compliance with Title VII, petitioners contend (*see*, *e.g.*, Br. 54) that the City was motivated by a discriminatory intent—namely, that it sought to discriminate against whites in favor of African-Americans (notwithstanding the fact that whites outnumber African-Americans in New Haven).[28] The evidence to which petitioners point offers nothing that could "lead a rational trier of fact to find for" petition-

[28] According to the 2000 census, 43.5% of the population of New Haven was white and 37.4% was black. U.S. Census Bureau, State & County, QuickFacts, New Haven, Connecticut, *at* http://quickfacts.census.gov/qfd/states/09/0952000.html (last visited Mar. 18, 2009).

ers. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Petitioners' arguments center around the view that race politics motivated the decision not to use the test scores, and the race politics arguments in turn focus on respondent Boise Kimber, an African-American minister. *See* Br. 11, 14, 17, 27 n.13, 30-31. Petitioners principally point to Kimber's public testimony before the Board[29]—even though Kimber was only one of numerous speakers, including petitioner Ricci himself as well as counsel for petitioners. Petitioners' counsel strongly urged the Board to certify, threatening legal action. CAJA814-817. Petitioners offer no basis to conclude that Board members were influenced (improperly or otherwise) by Kimber, petitioners' counsel, or anyone else.[30]

The arguments concerning Kimber also ignore the relevant decision-makers regarding test certification,[31] namely the members of the Civil Service Board. *See*

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[29] For ease of reference, petitioners cite the following to support their statements concerning Kimber: Pet. App. 490a-498a, 780a-781a, 812a-816a, 857a-858a, 882a-883a; CAJA556-559. Additional relevant testimony appears at: CAJA768-771, 798, 873-897, 904-905.

[30] *Cf. City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 195-198 (2003) (failure to show that allegedly discriminatory motives of voters could be attributed to city officials defeated equal protection claim against city officials on summary judgment).

[31] *Cf. City of Mobile* v. *Bolden*, 446 U.S. 55, 74 n.20 (1980) ("To the extent that the inquiry should properly focus on the state legislature, … the actions of unrelated governmental officials would be, of course, of questionable relevance.").

supra p. 6. Petitioners have not pointed to any evidence suggesting that any Board member was motivated by an intent to discriminate and the contemporaneous statements of the Board members opposing certification are to the contrary. Moreover, there is no evidence of any improper contact between Board members and City officials or that the Board's investigation was not independent.[32] It is revealing that, despite the fact that their allegations necessarily center around the Board members voting against certification, petitioners did not even seek to depose them.[33]

Petitioners attempt to create an inference of discriminatory intent by declaring that "New Haven and its officials have a documented history of violating Connecticut law to give minorities advantageous treatment in public employment." Br. 29. To the contrary, the City Fire Department's litigation history

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[32] Petitioners allege that City officials kept information from the Board, including a letter from IOS. Br. 11-12. Yet the record suggests that the City in fact provided the letter to the Board (CAJA1260) and, moreover, the record reveals that the City facilitated IOS's testimony before the Board (CAJA501) and that IOS testified in detail regarding the topics outlined in the letter. *Compare* Pet. App. 501a-536a (IOS testimony) *with* Pet. App. 337a-339a (IOS letter). Likewise, no discriminatory intent can be inferred from the fact that the City did not request a technical report, for the report would have simply described the process, and therefore, was not a "necessary document" (Pet. App. 596a-597a). *See supra* pp. 31-32. Other allegations that City officials kept information from the Board are similarly without merit. *Compare* Br. 14 (asserting the fire chief and assistant chief were "[n]ot allowed to speak" to the Board) *with* Pet. App. 850a; CAJA1342.

[33] Indeed, Webber and Tirado filed affidavits in this litigation stating that their votes were due to concerns that certifying would result in violating federal civil rights laws. CAJA1604, 1610.

demonstrates discrimination against African-Americans, not whites. *See Broadnax* v. *City of New Haven*, 851 A.2d 1113, 1138-1139 (Conn. 2004) (reversing dismissal of claim of intentional discrimination against African-American firefighters), *on remand*, No. CV980412193S, 2008 WL 590818, at *1-*2 (Conn. Super. Feb. 19, 2008) (unpublished) (awarding front pay and noting earlier award of back pay after June 2005 jury verdict on equal protection claim). Indeed, none of the cases that petitioners cite (Br. 5-6, 29) for the allegation that the City has favored minorities included any finding of "advantageous treatment" of "minorities."[34]

Given that petitioners have failed to identify any relevant evidence of race politics or discriminatory motives, there is no genuine factual dispute on the matter and no reason to proceed to trial. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-324 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]").

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[34] Three of the cited opinions did not even mention the possibility of discrimination. *Hurley* v. *City of New Haven*, No. 054009317, 2006 WL 1609974 (Conn. Super. May 23, 2006) (unpublished); *Bombalicki* v. *Pastore*, No. 378772, 2001 WL 267617 (Conn. Super. Feb. 28, 2001) (unpublished); *Henry* v. *Civil Serv. Comm'n*, No. 411287, 2001 WL 862658 (Conn. Super. July 3, 2001) (unpublished). In the fourth case (filed by petitioners' counsel), the court did not consider the discrimination allegations. *Kelly* v. *City of New Haven*, 881 A.2d 978, 986 n.12 (Conn. 2005).

D. 42 U.S.C. § 2000e-2(*l*) Does Not Prohibit A Decision To Decline To Certify Test Results

Finally, petitioners argue (Br. 62-66) that the non-certification of the exams violates 42 U.S.C. § 2000e-2(*l*), which makes it unlawful for an employer "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race[.]" This Court should reject this strained reading of Section 2000e-2(*l*).[35]

To start with, the plain language of the statute, which forbids "alter[ing] the results of … tests," does not prohibit declining to use a test. *See* U.S. Br. 20 (defining "alter"). Section 2000e-2(*l*), moreover, is entitled "Prohibition of discriminatory *use* of test scores," 42 U.S.C. § 2000e-2(*l*) (emphasis added), and "otherwise alter[ing]" must be read in conjunction with the two prohibitions preceding it—those of "adjusting the scores of" and "using different cutoff scores for" tests. The "otherwise altering" prohibition thus applies only to test scores that are being used. Indeed, Congress expressed that these prohibitions are triggered only "once a test is determined to be employment related." 137 Cong. Rec. 29,047 (1991).

II. Declining To Certify The Test Results Did Not Violate The Equal Protection Clause

The equal protection question in this case addresses what a public employer may do when faced with tests that appear to violate Title VII's disparate-impact provisions. Here, the City did not adopt af-

[35] The lower courts did not address this argument—which was not squarely presented below—and thus offered no interpretation of this provision.

firmative-action policies, engage in racially proportional promotions, or adjust test scores to benefit minority candidates. Rather, it merely declined to use the tests given substantiated concerns that such use would violate the disparate-impact provisions of Title VII. This approach to tests that raise red flags about whether candidates are being properly evaluated for promotion is precisely the sort of race-neutral, narrow conduct directed towards compliance with Congress's mandate and assuring a fair and merit-based selection process that the Constitution permits.

A. The Non-Certification Of The Test Results Did Not Trigger Strict Scrutiny

Petitioners appear to argue that strict scrutiny applies for two reasons: first, because the non-certification is allegedly a racial classification such as those in cases like *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and *Croson*, 488 U.S. 469, and second, because respondents purportedly acted with discriminatory intent. The first argument fails on its face; the second does not survive review at summary judgment.

1. Declining to certify the test results did not entail racial classifications triggering strict scrutiny

Petitioners suggest (Br. 21-27) that this case involves racial classifications such as occurred in cases like *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738 (2007), *Adarand*, and *Croson*. These cases, however, all involved the allocation of opportunities that expressly depended on the race of the individual. *Parents Involved*, 127 S. Ct. at 2746; *Adarand*, 515 U.S. at 213; *Croson*, 488 U.S. at 477-478.

The government action at issue here, which did not treat individuals differently according to race, is of a fundamentally different character. The promotions petitioners seek have not been awarded on the basis of a racial quota or pursuant to an affirmative-action plan, nor will they be. Rather, all that has happened is that the test results went uncertified for all candidates, those who passed and those who did not, where both categories included white and black individuals. Pet. App. 429a-436a; JA227. This case thus lacks the hallmark of express racial classifications—"state-mandated racial label[s]" that determine the "allocation of benefits and burdens." *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, petitioners have repeatedly noted that, under these tests, African-Americans as well as Hispanics would have been available to be promoted. *See, e.g.*, Br. 61-62 n.27 (asserting that "the city denied 5 highly qualified minorities well-deserved promotions—to their dismay, *see* Pet. App. 420a-422a" as a result of its decision not to use the tests); Br. 26 & n.11. The non-certification "neither says nor implies that persons are to be treated differently on account of their race." *Crawford* v. *Board of Educ.*, 458 U.S. 527, 537 (1982).

That the higher-scoring group was disproportionately white does not render non-certification a racial classification; it simply means that the race-neutral conduct had differential *effects*, and such effects can trigger strict scrutiny only if accompanied by discriminatory intent. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); *see infra* Part II.A.2. Any such argument, moreover, presumes a critical factor that is absent here—that the tests properly assessed candidates for promotion. If the tests did not do so—and, as discussed

above, *see supra* Part I.C., there is at least a strong basis to conclude they did not—then any argument about disproportionate effects fails because the white candidates with superior scores should not have obtained those scores in the first place. *Cf. Croson*, 488 U.S. at 526 (Scalia, J., concurring in the judgment) (a "State may … giv[e] to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white job-holder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled."); *see also Billish* v. *City of Chicago*, 989 F.2d 890, 895 (7th Cir. 1993) (en banc) (Posner, J.) (Plaintiffs "have no vested rights in their position on an eligibility list compiled on the basis of an examination that may have been biased in favor of whites").

In an effort to suggest that racial classifications were nonetheless at issue, petitioners repeatedly refer to "race-coded lists," stating, for example: "Using race-coded lists to determine whether to certify, the city and its officials acted on raw racial labels and distributions." Br. 23. But the lists did not lead to differential treatment, which is what raises the constitutional question. *Croson*, 488 U.S. at 493 (plurality opinion) (racial classification worked to deny to non-minorities opportunities to compete for contracts).[36] Rather, the lists were just

[36] Petitioners' suggestion (Br. 25) that *Croson* is comparable because there had been "across-the-board cancellation of bids" ignores the central issue in that case, which was not the cancellation of bids, but what petitioners acknowledge (*id.*) was a "minority-subcontracting set-aside." Here, there is no comparable program; rather, petitioners challenge the non-certification standing alone.

lists, the mere existence of which is required under EEOC guidelines concerning records of racial impact of employment practices. 29 C.F.R. § 1607.15(A); *see also, e.g.*, *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (it would be permissible to "track[] enrollments, performance, and other statistics by race"); *Shaw* v. *Hunt*, 517 U.S. 899, 925-926 (1996) (*Shaw II*) (Stevens, J., dissenting) (strict scrutiny ought not apply to decision to require race disclosures on the census).

2. Strict scrutiny is not warranted on the theory that respondents acted with discriminatory intent

This Court has found that certain race-neutral conduct may nonetheless trigger strict scrutiny. However, to avoid the harm that would flow from subjecting every government decision to strict scrutiny, facially neutral conduct is entitled to "judicial deference" unless the plaintiff demonstrates that a "discriminatory purpose has been a motivating factor in the decision." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-266 (1977). Apparently invoking this theory, petitioners contend (Br. 23) that all of the reasons provided by respondents are "grounded on the race of the successful candidates" and thus respondents' conduct triggers strict scrutiny. Specifically, they contend that strict scrutiny applies whether the motivation was Title VII compliance or a refusal to promote white candidates because they were white. Br. 23-26. Neither argument warrants the application of strict scrutiny in this case.

a. The intent to comply with Title VII

Petitioners' argument (Br. 24) that an intent to comply with Title VII's disparate-impact provisions is a "race-related reason[]" that warrants strict scrutiny is contrary to this Court's cases and threatens many long-accepted practices.

As a general matter, this Court's equal protection cases favor race-neutral action even when geared towards ends that relate to race, whether they be diversity in higher education or improved economic opportunities for minorities. *See Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003) (narrow tailoring requires, *inter alia*, "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks"); *Croson*, 488 U.S. at 509 ("Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.").

Several Justices have suggested more explicitly that conduct that is race-neutral but nonetheless taken for what petitioners would term a "race-related reason" would not trigger strict scrutiny. In the context of elementary schools, for example, Justice Kennedy suggested that school officials concerned about "student-body compositions … are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race." *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment). Proposing approaches that are clearly "race-related" under petitioners' approach, such as "strategic site selection of new schools; … allocating resources for special pro-

grams; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race," Justice Kennedy stated: "These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Id.*

Similarly, Justice Thomas's discussion of decisions made with diversity objectives in mind suggests that such decisions would probably not be subjected to strict scrutiny. For example, "the adoption of different admissions methods" by public universities in order to increase the diversity of their student-bodies, "such as accepting all students who meet minimum qualifications," likely would not be subject to strict scrutiny. *See Grutter*, 539 U.S. at 361 (Thomas, J., concurring in part and dissenting in part). Justice Thomas also explained that when schools use tests like the LSAT despite "racially skewed results," if they "then attempt to 'correct' for black underperformance," that will trigger strict scrutiny because "[h]aving decided to use the LSAT, [schools] must accept the constitutional burdens that come with this decision." *Id.* at 370. The suggestion is that a school may freely decide not to use the LSAT in the first place given the "poor performance of blacks." *Id.* at 369. Justice Scalia has supported comparable conduct: race-neutral programs with "a disproportionately beneficial impact on blacks," such as a "race-neutral remedial program aimed at the disadvantaged *as such*," are "in accord with the letter and the spirit of our Constitution." *Croson*, 488 U.S. at 528 (Scalia, J., concurring in the judgment) (emphasis in original).

These cases demonstrate that in cases such as *Arlington Heights*, "discriminatory purpose" did not extend to *any* consideration of race. And if race-neutral action may be taken, without triggering strict scrutiny, with the goal of achieving diversity or providing improved opportunities to certain groups—goals that state or local actors arrive at *sua sponte*—then surely efforts to comply with a mandate set by Congress will not be deemed "discriminatory." *See infra* Part II.B.

Not only do petitioners offer no relevant authority in support of their approach, but its far-reaching consequences also undermine its viability. In the employment context alone, any employer's decision to switch from one race-neutral promotion system to another would be treated as a racial classification subject to strict scrutiny if it were adopted even in part to avoid the disparate effects of the prior system. A State's decision to eliminate a veterans' preference, for example, would be treated as a gender-based classification if the elimination were motivated by a desire to eliminate the adverse effect the preference had on women.

Beyond Title VII, the race-neutral practices with race-related goals approved of above would be cast into doubt, as would be race-neutral actions taken to comply with such laws as the Voting Rights Act, the Fair Housing Act's prohibition on discrimination, 42 U.S.C. § 3604(b), and Title VI's regulations prohibiting the adoption of policies that have "the effect of … substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin," 28 C.F.R. § 42.104(b)(2). Numerous other contexts where race is taken into account would also be at risk. For example, "a provision of the No Child Left Behind Act … requires States to set measurable objectives to track the achievement of stu-

dents from major racial and ethnic groups." *Parents Involved*, 127 S. Ct. at 2766 (citing 20 U.S.C. § 6311(b)(2)(C)(v)). If a State were to act on this data—by, for example, increasing investment in Head Start—that also would be subject to strict scrutiny.[37] Even the census, which has collected data on race since 1790, *see* 1 Stat. 99, 101-102 (1790), and is used for purposes of determining grant benefits, local planning, legislation, and other purposes, would be constitutionally suspect.

b. The purported intent "not to promote white firefighters precisely because they were white"

Petitioners' alternate theory of intent is that respondents' aim was racial balancing and thus they refused to certify the tests because they did not want to promote white firefighters because they were white. Br. 25-26. For the reasons explained above, however, this argument that compliance with Title VII was a pretext for discrimination against whites cannot survive summary judgment. As discussed, petitioners fail

[37] Petitioners' theory would similarly require strict scrutiny to be applied to race-neutral action taken to try to remedy widespread disparities in health. *See, e.g.*, Roemer, *Inner-City Mammography Programs Aim to Make Breast Cancer "A Visible Disease,"* 92 J. Nat'l Cancer Inst. 444, 445 (2000) (describing a "federally and state-funded program" of "breast and cervical cancer screening" in Harlem); *see also* Pub. L. No. 106-525, § 301(b), 114 Stat. 2495, 2507 (2000) ("[T]he National Academy of Sciences shall prepare and submit … a report that—(1) identifies the data needed to support efforts to evaluate the effects of socioeconomic status, race and ethnicity on access to health care[.]"); *see generally* Burchard et al., *The Importance of Race and Ethnic Background in Biomedical Research and Clinical Practice*, 348 New Eng. J. Med. 1170 (2003).

to focus on the actual decision-makers, *see, e.g.*, *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 n.20 (1980). Petitioners' other allegations lack support in the record and do not give rise to a genuine material factual dispute as to the question of "discriminatory intent." *See supra* Part I.C.3.

B. Respondents Had A Compelling Interest In Complying With Title VII's Disparate-Impact Provisions

Even if this Court determines that strict scrutiny applies to the Board's conduct in declining to certify the tests for all candidates, it should conclude that respondents have demonstrated a compelling interest in compliance with Title VII. Petitioners argue (Br. 28-29) that compliance with Title VII can never provide a compelling interest, and (Br. 33) that even if it does, an employer must prove a violation to invoke this interest. Contrary to petitioners' view and consistent with this Court's case law, compliance with Title VII's disparate-impact provisions may provide a compelling interest where the employer has a "strong basis in evidence" to conclude that use of a test would violate Title VII. By not requiring employers to prove a violation against themselves, this standard creates a zone of permissible conduct that provides the necessary, but still bounded, flexibility to the employer. It also avoids imposing on society the burden of a zero-sum approach to discrimination that, pitting race against race, converts day-to-day government decision-making into presumptive constitutional violations.

1. Compliance with Title VII's disparate-impact provisions can be a compelling interest

Petitioners seek a holding that compliance with Title VII's disparate-impact provisions can never be a

compelling interest. Br. 28-33. Contrary to petitioners' view, compliance with Title VII's disparate-impact provisions may be a compelling interest given the long-standing approval by this Court and Congress of these provisions and the destabilizing effect on the enforcement of federal law of the contrary view.

That compliance with a federal statute may serve as a compelling interest is entirely sensible. If that were not the case, "then a State could be placed in the impossible position of having to choose between compliance with [the statute] and compliance with the Equal Protection Clause." *League of United Latin American Citizens (LULAC)* v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part). This problem of hamstringing employers is not solved by petitioners' suggestion (Br. 29) that the disparate-impact provisions must bend to the Equal Protection Clause because that clause is part of the Constitution. This merely begs the question whether the compliance with the statute—like any other goal that is offered as a compelling interest—may justify (when narrowly tailored) the kind of treatment that the Equal Protection Clause otherwise guards against.

Both this Court and Congress have approved of disparate-impact liability, cementing its legitimacy over almost forty years. Before disparate impact was expressly addressed as such in Title VII, *Griggs*, 401 U.S. at 431, interpreted Title VII to "proscribe[] … practices that are fair in form, but discriminatory in operation." This interpretation has been "repeatedly affirmed." *Watson*, 487 U.S. at 988. Congress, too, has approved liability for disparate-impact discrimination. After noting *Griggs* with approval in the Committee Reports on the 1972 amendments to Title VII, *see* S.

Rep. No. 92-415, at 5 & n.1, 14 (1971); H.R. Rep. No. 92-238, at 8 (1971), Congress codified *Griggs*, "provid[ing] statutory guidelines" for disparate-impact claims, Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(3), 105 Stat. 1071, 1071; *see also id.* §§ 104-105, 105 Stat. at 1074-1075.

This treatment by the Court and Congress only reinforces the conclusion that States, consistent with the Supremacy Clause, are obligated to comply with Title VII, including the disparate-impact provisions. Especially in light of this history, "it would be irresponsible for a State to disregard" Title VII's disparate-impact provisions. *Vera*, 517 U.S. at 991 (O'Connor, J., concurring) (addressing the question of compliance with Section 2 of the Voting Rights Act as a compelling interest in light of the Court's implicit approval of Section 2). Indeed, that the compelling interest relied upon here comes from Congress and this Court, rather than from a State, city, public educational institution, or the like is important. *See Croson*, 488 U.S. at 521-525 (Scalia, J., concurring in the judgment) (citing concerns about "'plan[s] of oppression'" devised by "'smaller'" political units, as compared to "'extend[ed] sphere[s]'" where "'it [is] less probable that a majority of the whole will have a common motive to invade the rights of other citizens'" (quoting James Madison, The Federalist No. 10, at 82-84 (C. Rossiter ed. 1961))).

Petitioners appear to argue (Br. 28-29) that compliance with Title VII's disparate-impact standard cannot be a compelling interest because "the Equal Protection Clause forbids only intentional racial discrimination in governmental employment, not mere disparate impacts." Br. 29 (citing *Davis*, 426 U.S. at 242). But this logic falls short: That the Equal Protection Clause does not prohibit unintentional discrimination does not mean

that avoiding unintentional discrimination cannot be a compelling interest. Notably, the Equal Protection Clause does not prohibit nondiverse student bodies in higher education, but this Court has found such diversity to be a compelling interest. *See Grutter*, 539 U.S. at 328 (higher education); *see also Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment) (grade-school). The lack of diversity, moreover, is implicitly assumed to be unintentional. *See Parents Involved*, 127 S. Ct. at 2752-2753 (contrasting the compelling interest of remedying effects of past intentional discrimination, which requires a showing of past intentional discrimination, with diversity, which does not). *Davis*, moreover, itself observed that even though the Equal Protection Clause was limited to intentional racial discrimination, Congress could prohibit unintentional discrimination, 426 U.S. at 248, as it has done in Title VII.

Although this Court has not resolved the question, it has assumed in several decisions that compliance with a federal statute constitutes a compelling interest, and individual Justices have concluded as much. *See, e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997) (assuming compliance with Section 2 of the Voting Rights Act can be a compelling interest) (citing *Miller* v. *Johnson*, 515 U.S. 900, 921 (1995)); *Shaw II*, 517 U.S. at 915 (same). In *LULAC*, eight Justices concluded that compliance with Section 5 of the Voting Rights Act was a compelling interest. *See* 548 U.S. at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined as to this point by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.); *id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Roberts, C.J., Thomas, J., and Alito, J.). Several Justices have

agreed that compliance with Section 2 was as well. *Vera*, 517 U.S. at 1033 (Stevens, J., dissenting, joined by Ginsburg, J., and Breyer, J.) (describing majority's assumption that a State has a compelling interest in complying with Section 2 as "perfectly obvious"); *id.* at 990-992 (O'Connor, J., concurring).

2. Respondents satisfy the "strong basis" standard for asserting compliance with Title VII as a compelling interest

Petitioners argue that even if compliance with disparate-impact provisions is a compelling interest, that interest may be asserted only in certain circumstances. Specifically, much like their Title VII arguments, petitioners first assert that the tests must actually violate the disparate-impact provisions if the tests are not to be used for promotions, and second assert that, at the least, a "strong evidentiary basis" for a disparate-impact violation is needed. Br. 33-34. The case law reflects that, rather than proof of a violation, the "strong basis" standard applies—a standard that respondents readily satisfy.

As an initial matter, respondents need not demonstrate an actual violation of Title VII's disparate-impact provisions in order to assert compliance with Title VII as a compelling interest. In *Wygant*, for example, the Court considered the school board's compelling interest in remedying past discrimination and concluded that an actual violation was not required, but rather, the employer must have "a strong basis in evidence for its conclusion that remedial action was necessary." 476 U.S. at 277 (plurality opinion); *see also Croson*, 488 U.S. at 500. The Court has taken the same approach in cases where the compelling interest relates to avoiding future violations. In *Vera*, 517 U.S. at 976

(plurality opinion), the State sought to justify redistricting on the ground that it had a compelling interest in avoiding a violation of Section 2 of the Voting Rights Act. Consistent with the recognition that a State has no compelling interest in "avoiding meritless lawsuits," *Shaw II*, 517 U.S. at 908 n.4, the Court explained that some evidence of a violation of Section 2 was needed, *Vera*, 517 U.S. at 978 (plurality opinion). Nonetheless, the Court stopped well short of requiring—as petitioners would have it—evidence that would prove a Section 2 violation and required instead a "strong basis in evidence." *Id.* The Court's refusal to require an actual violation is appropriate here given the consequences of imposing such a high threshold. As in the Title VII context, *see supra* Part I.B., requiring an actual disparate-impact violation may serve to freeze employment practices, including those that are in fact discriminatory, because of the disincentives this standard creates for employers.

Here, as detailed above, there is evidence of a prima facie disparate-impact violation—indeed, the statistical disparity is extreme. *See supra* Part I.C.2.a.; Pet. Br. 50-51. The Board also heard evidence of flaws in test design and test content that support the conclusion that the tests were not properly assessing candidates for promotion and in turn reinforce the inference of a disparate-impact violation. *See supra* Part I.C.2.b. The Board also heard evidence of a number of equally valid, less-discriminatory alternatives. *See supra* Part I.C.2.c. Petitioners, meanwhile, have identified no evidence that shows concerns about test flaws or alternatives ultimately to be unfounded. Such circumstances are more than sufficient to establish a "strong basis" as a matter of law; there is not merely evidence of a prima facie case, but a prima facie case plus evidence of test

flaws and less-discriminatory alternatives that substantiated the inference of discrimination. *See generally supra* Part I.C.[38]

C. The Non-Certification Of The Test Results Was, By Definition, Narrowly Tailored To Achieve The Compelling Interest In Avoiding Violations Of Title VII's Disparate-Impact Provisions

Where a State's compelling interest is to avoid violating a federal anti-discrimination statute, its conduct is narrowly tailored if it "remed[ies] the anticipated violation or achieve[s] compliance." *Shaw II*, 517 U.S. at 916. That is precisely what has happened here: The compelling interest was to avoid an anticipated violation of Title VII by certifying and using the tests for promotions, and the challenged conduct—declining to certify the tests and use them for promotions—did just that and no more. *LULAC*, 548 U.S. at 519 (Scalia, J., concurring in the judgment in part and dissenting in part) (the State may not "use racial considerations to achieve results beyond those that are required to comply with the statute").

This Court has warned that the State must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the [goal]" and must not "unduly harm members of any racial group." *Grutter*, 539 U.S. at 339, 341. Here, the City's one-time

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[38] The Court's cases addressing the "strong basis in evidence" standard do not undermine the conclusion that it is satisfied here. In these cases, the defendants fell well short of establishing even a prima facie case of a violation. *See, e.g.*, *Croson*, 488 U.S. at 500 (city's evidence provided "nothing approaching a prima facie case of a constitutional or statutory violation"); *Abrams*, 521 U.S. at 91 (none of the "threshold findings" for the violation was established).

conduct regarding promotions did not prefer one race over another and by nature does not inflict undue harm on particular racial groups.[39] *See* U.S. Br. 31 (observing that while those who did well on the tests may be disappointed, "disappointment is not in itself the sort of 'unacceptable burden' on innocent persons, [*United States* v.] *Paradise*, 480 U.S. [149,] 182 [(1987)] (plurality opinion), that must frustrate the accomplishment of compelling interests as a constitutional matter"). Non-certification was also more narrowly-tailored than other race-neutral options, such as promoting by lottery or abolishing promotions altogether.

Petitioners' suggestions of more narrowly-tailored options are entirely misplaced as they concern "steps [that] might have [been] taken prior to administering the tests[.]" Br. 41. Such "alternatives" are irrelevant to respondents here, once faced with tests that appeared, based on a variety of evidence, to violate Title VII. Strikingly, one of the alternatives proposed (Br. 41) is "tutoring programs" targeted at minorities. But such conduct is subject to exactly the type of overbroad equal protection claim petitioners have brought in this case—that a decision undertaken by an employer with racial considerations in mind is automatically subject to strict scrutiny and invalid. This suggestion, moreover, unlike the conduct at issue here, allocates burdens and benefits according to race.

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[39] *Cf. Wygant*, 476 U.S. at 282-283 (plurality opinion) ("Denial of a future employment opportunity is not as intrusive as a loss of an existing job.").

CONCLUSION

For these reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted.

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